

JUN 24 1998

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In The  
Supreme Court of the United States  
October Term, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI,  
INC., RICHARD BUCHANAN, CHAD BUSH,  
EDWIN GREENE, RITA MATHIS, ROGER ASTERINO,  
AND H.O.M.E., INC.,

v.

*Petitioners,*

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT  
SPECIAL RIGHTS, MARK MILLER, THOMAS E.  
BRINKMAN, JR., AND ALBERT MOORE,

*Respondents.*

On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE CITIES OF ASPEN, ATLANTA,  
BOULDER, LOS ANGELES, NEW YORK,  
PHILADELPHIA, PORTLAND, SAN FRANCISCO,  
AND SEATTLE AS AMICI CURIAE  
IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST

Amici curiae – the cities of Aspen, Atlanta, Boulder, Los Angeles, New York, Philadelphia, Portland, San Francisco, and Seattle submit this brief in support of petitioners, Equality Foundation of Greater Cincinnati, *et al.*, pursuant to Supreme Court Rule 37.4. Amici are collectively referred to as “the Cities.”

This case concerns whether “Issue 3,” an amendment to the Cincinnati City Charter violates the Equal Protection Clause of the Fourteenth Amendment. Issue 3 is identical in all relevant respects to the Colorado constitutional amendment this Court invalidated in *Romer v. Evans*, 517 U.S. 620 (1996).

The Cities have a direct interest in this matter. By holding that Issue 3 does not violate the Equal Protection Clause, the Sixth Circuit has created a novel two-tiered approach to equal protection law. If allowed to stand, this approach would undermine the ability of the Cities to treat all their citizens impartially, and would create confusion as to when actions by the Cities might violate the Equal Protection Clause.

The Cities urge this Court to overturn this unprecedented two-tiered approach to the Equal Protection Clause by summarily reversing the Sixth Circuit’s decision or subjecting it to plenary review.

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## STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by petitioners.

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## REASONS FOR GRANTING THE WRIT

In upholding Issue 3, the Sixth Circuit refused to follow the squarely applicable precedent of *Romer*. In *Romer*, this Court invalidated "Amendment 2," a Colorado constitutional amendment barring any protection against discrimination by all levels of state government on the basis of homosexual, lesbian or bisexual status. 517 U.S. at 623. Issue 3 is identical in all relevant ways to Amendment 2. Both measures single out a class of gay, lesbian and bisexual citizens. Both measures deny only this class the right to seek government protection against discrimination. And both measures repeal existing laws and policies and forbid the adoption of future ones protecting this class against discrimination, absent a vote by the full electorate.<sup>1</sup>

Nevertheless, the Sixth Circuit upheld Issue 3, distinguishing its local impact from the statewide reach of

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<sup>1</sup> Because the text of the two measures is virtually identical, it would be difficult to find a case more clearly governed by *Romer*. It is unclear whether the Sixth Circuit's effort to distinguish *Romer* relies on the minor differences in the language of the two measures. While the Cities believe these minor differences have no constitutional significance, if this Court does not summarily reverse the Sixth Circuit, it should grant *certiorari* to consider this question.

Colorado's Amendment 2. "*Romer* should not be construed to forbid local electorates the authority, via initiative, to instruct their elected . . . representatives . . . to withhold special . . . protections . . . ." <sup>2</sup> *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* ("Equality Foundation 2"), 128 F.3d 289, 298 (6th Cir. 1997) (emphasis added). The Sixth Circuit's novel two-tiered approach is unsupported by this Court's precedents. It deprives citizens of their right to impartial treatment from cities, and creates confusion for cities about their obligations under the Equal Protection Clause.

### I. The Sixth Circuit's Decision Deprives Citizens Of Their Right To Impartial Treatment From Cities.

The Equal Protection Clause of the Fourteenth Amendment commands that government shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. In *Romer*, this Court reaffirmed the meaning of this command: "[G]overnment and each of its parts remain open on impartial terms to all who seek its assistance." 517 U.S. at 633. This Court accordingly held that "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is

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<sup>2</sup> As this Court noted in *Romer*, there is nothing special about the protections from discrimination withheld by measures like Amendment 2 and Issue 3. "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." 517 U.S. at 631.

itself a denial of equal protection of the laws in the most literal sense." *Id.* Thus, *Romer* did not turn on the statewide reach of Amendment 2, but on the *special disability* Colorado imposed upon the class of gay, lesbian, and bisexual people in relation to all other groups. *Id.* at 631.

Issue 3 imposes a disability *identical* to that imposed by Amendment 2. Before Issue 3, gay, lesbian and bisexual people had the same right to seek legal protection from discrimination as other groups. They could obtain such protection by ordinance of the Cincinnati City Council, or through adoption and administration of regulations, rules or policies by any department, board or city official. Issue 3 forecloses these "ordinary municipal political processes" to gays, lesbians and bisexuals. Instead, this group must now take the extraordinary steps to obtain an amendment to the City Charter.<sup>3</sup> As the

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<sup>3</sup> The Sixth Circuit suggests that "ordinary municipal political processes" would remain open to gays, lesbians and bisexuals. *Equality Foundation 2*, 128 F.3d at 297. The Sixth Circuit gravely misunderstands the effect of an amendment to a city's charter. In states where the state constitution contains a home rule provision, a city's charter is equivalent to a local constitution. A city charter is to a city what the state constitution is to a state. 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.03 (3rd ed. 1993). Thus, the local effect of an amendment to a city charter is equivalent to the statewide effect of an amendment to a state constitution. "Ordinary municipal processes" are no longer unavailable to gay, lesbian and bisexual people in Cincinnati because these processes are subordinate to the charter provision adopted as Issue 3. As the district court held, "[A]ny and all laws, regulations, ordinances or policies of the City of Cincinnati - with the exception of other charter provisions - are inferior [to Issue 3], and any legislation

District Court found: "Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* ("Equality Foundation 1"), 860 F. Supp. 417, 427 (S.D. Ohio 1994). By contrast, all other groups can approach all branches and all levels of city government to obtain legal protection against discrimination. By making it "more difficult for one group of citizens than for all others to seek aid from the government," Issue 3 constitutes a "denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633.

An example illustrates this "special disability." Suppose that a city employee who processes building permits refuses to process permit applications submitted by gay, lesbian or bisexual contractors because the employee does not want to encounter them on construction sites. An applicant complains that the city has discriminated against him by denying a building permit because he is gay. The applicant could not obtain legal protection from discrimination through "ordinary municipal political processes." For example, he could not ask the Department to issue a directive that staff may not take an applicant's homosexual, lesbian or bisexual orientation into account when issuing building permits. Under Issue 3, such a directive would unlawfully "enact [a] policy which provides that homosexual, lesbian or bisexual orientation . . . provides a person with the basis to have any

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or policy to the contrary [of Issue 3] is invalid." *Equality Foundation 1*, 860 F. Supp. at 428.

claim of . . . protected status." Nor could the applicant ask the City Council to enact an ordinance banning consideration of an applicant's homosexual, lesbian or bisexual orientation in deciding whether to grant or deny a building permit. Under Issue 3, such a measure would unlawfully "enact [an] ordinance which provides that homosexual, lesbian or bisexual orientation . . . provides a person with the basis to have any claim of . . . protected status." Instead, the applicant must appeal to every voter in the City to enact a charter amendment to obtain legal protection from discrimination based on his sexual orientation. Issue 3 thus imposes the same "special disability" on gay, lesbian and bisexual people that this Court condemned in *Romer*.

Like Amendment 2, Issue 3 "is unprecedented in our jurisprudence" in its "disqualification of a class of persons from the right to seek specific protection from the law." *Romer*, 517 U.S. at 633. Should the Sixth Circuit's decision be allowed to stand, city governments could be forced to shut their doors to a class of citizens seeking legal protection from discrimination, while state governments could not. Cities alone among all the political subdivisions could be rendered powerless to protect a class of citizens from discrimination based on their status, no matter how invidious the injury, no matter how unjustified the harm.

In other contexts, this Court has recognized that cities are uniquely positioned to identify and to respond to invidious discrimination. See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (local authorities have "the primary responsibility for elucidating, assessing, and solving" the problems of desegregation); *Missouri v. Jenkins*,

495 U.S. 33, 52 (1990) ("local officials should at least have the opportunity to devise their own solutions to these problems"). This Court has explained: "Authorizing and directing local government institutions to devise and implement remedies not only protects the functions of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems." *Jenkins*, 495 U.S. at 51. Although these cases involved suspect classifications, they recognize that the power to address invidious discrimination should rest with local authorities.

The Sixth Circuit's decision would mean that cities could be stripped of this power to protect a class of citizens from invidious discrimination. To permit this ruling that cities may be *less* impartial in their dealings with their citizens than states undermines the very meaning of "the equal protection of the laws." Under our federalist system of government, most of "the limitless number of transactions and endeavors that constitute ordinary civic life" occur at the local level. See *Romer*, 517 U.S. at 631.

Cities are not required to legislate against discrimination at all, and cities are free to repeal such protections once extended. But amending a city's charter to deny a class of citizens even the *possibility* of seeking legal protection from discrimination from all branches and levels of city government involves a fundamentally different action. Under *Romer*, all Cincinnati citizens, including gay, lesbian and bisexual citizens, must have an equal right to petition their elected representatives and other city officials for protection against discrimination. All

Cincinnati citizens must have an equal right to be treated impartially by city government in this respect.

## II. The Sixth Circuit's Decision Unsettles Clear Law About Cities' Obligations Under The Equal Protection Clause.

The Sixth Circuit's decision can stand only if different Equal Protection standards apply to cities than to states. According to the Sixth Circuit, although a state constitutional amendment that shuts the doors of state government to citizens seeking legal protection from discrimination would violate the Equal Protection Clause, a similar city charter amendment that shuts the doors of local government would not. The Sixth Circuit's decision would afford *less* protection under the Equal Protection Clause from actions taken by cities than from actions taken by states.

This novel two-tiered approach to the Equal Protection Clause finds no support in this Court's precedents. To the contrary, this Court always has applied the same Equal Protection standards to both cities and states. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 480 (1968) ("it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State."); *Hunter v. Erickson*, 393 U.S. 385, 389-90, 392 (1969) (for the purposes of the Equal Protection Clause, a city "unquestionably wields state power," and a law that otherwise violates the Clause is not permissible simply because passed by local referendum); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970) ("a law whose source is a town

ordinance can offend the Fourteenth Amendment even though it has less than state-wide application"); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 215 (1984) ("what would be unconstitutional [under the Equal Protection Clause] if done directly by the State can no more readily be accomplished by a city deriving its authority from the State").

If upheld, the Sixth Circuit's extraordinary departure from this Court's Equal Protection jurisprudence would unsettle an entire body of constitutional law. Under the Sixth Circuit's reasoning, desegregation cases that addressed *state* bans on minority admissions to *state* schools would not govern the actions of cities and local school districts. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950) (overturning state law forbidding admission of minorities to state law school). Similarly, anti-discrimination cases addressing *state* laws would not apply to cities. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state law provisions prohibiting interracial marriage); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating state constitutional amendment prohibiting any interference by the state with the right to sell, lease or rent private property). Even tax cases addressing *state* measures would not apply to cities. *See, e.g., Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985) (striking down state tax imposing substantially higher rates on extraterritorial insurance companies).

The Sixth Circuit's decision creates a profound break in a fundamental, settled area of law. If allowed to stand, the Cities would face immediate confusion about what standard of equal protection applies to a wide range of actions taken by their legislative bodies and executive

staff and departments. Cities need this Court's guidance to determine whether, as the Sixth Circuit has ruled, their actions are subject to a lower standard under the Equal Protection Clause.

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### CONCLUSION

The Cities of Aspen, Atlanta, Boulder, Los Angeles, New York, Philadelphia, Portland, San Francisco, and Seattle respectfully join in the request filed by Equality Foundation of Greater Cincinnati, *et al.*, for this Court to summarily reverse the decision of the Sixth Circuit or subject it to plenary review.

Dated: June 24, 1998

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